

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JACK W. SHAW, III)	
Claimant)	
V.)	
)	
ALAN RITCHEY, INC.)	
Respondent)	Docket No. 1,072,389
AND)	
)	
ACE AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the July 24, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Matthew L. Bretz of Hutchinson, Kansas, appeared for claimant. Kim R. Martens of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 5, 2015, preliminary hearing and exhibits thereto; the transcript of the May 13, 2015, deposition of claimant and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

The ALJ found claimant sustained a personal injury by accident in Oklahoma arising out of and in the course of his employment. The ALJ ruled claimant entered into his employment contract with respondent in Kansas and was covered by the Kansas Workers Compensation Act (Act).

Respondent asserts claimant entered into his employment contract in Oklahoma and Kansas does not have jurisdiction. Respondent contends claimant failed to prove his accident was the prevailing factor causing his injury and need for medical treatment.

Claimant requests the Board affirm the preliminary hearing Order.

The issues are:

1. Does Kansas have jurisdiction over this claim?
2. If so, did claimant sustain a personal injury by accident arising out of and in the course of his employment?

FINDINGS OF FACT

Claimant's preliminary hearing testimony

Claimant indicated he was in Las Vegas, Nevada, hauling semi-trucks for another company when he heard respondent had some job openings. He indicated he previously worked for respondent and knew some of respondent's dispatchers. He received a call from a man with whom he had worked at respondent and was told respondent had some job openings. Claimant called respondent and spoke to a woman in human resources, whose name he could not remember. Claimant testified:

Q. Okay, and when you, tell me how the call went when you were in Las Vegas?

A. I called down there and asked them if, you know, I heard they had some positions open for the oil field and she said yes. And she kind of asked me my background and I told her I had worked there before. She goes, well, I think we can use you then.

Q. Did she offer you the job then?

A. Pretty much, yes. She called me back 30 minutes later.

Q. So the second call you had while you were still in Las Vegas was the call that consummated the, or completed the, the employment contract with Alan Ritchey?

A. Well, I mean, there was a job offer depending on [a] driving test and physical and drug test.

Q. And you, you, the agreement was that you were going to be working at or around Alva, Oklahoma, correct?

A. Not necessarily. They also had places in Kansas. They were looking at opening one in Wichita, Kansas -- or, yeah, or [El Dorado], Kansas.

...

Q. Okay. So the, the final acts to complete the employment arrangement with Alan Ritchey was the driving test in Oklahoma?

A. No. It was the drug test and physical.¹

Claimant testified that respondent's personnel to whom he was speaking about the job were located in Valley View, Texas, and none were located in Kansas. Claimant indicated his drug test and physical took place at Via Christi in Wichita, Kansas. He testified that after passing his physical and his drug tests, someone from respondent in Valley View, Texas, called him at his home in Inman, Kansas, formally offered him the job in Alva, Oklahoma, and he accepted.

Claimant traveled from his home to Alva, Oklahoma, to work for respondent for one or two months at a time where he stayed in housing provided by respondent. He would leave Alva in a tanker truck and load oil from oil tank batteries onto his truck and return to Alva at the end of each workday. Forty to forty-five percent of the locations he serviced were in Kansas and the rest were in Oklahoma. After loading his truck, claimant was required to climb a ladder or metal steps to the top of the oil tank and measure the oil level.

On October 21, 2014, claimant was descending metal steps after measuring the oil level of a tank southeast of Alva when he slipped on oil that was on the steps. He also testified it was misting that day. Claimant reached with his right hand to catch himself by grabbing the railing. His right arm got caught in the railing and he injured his right shoulder and neck. He testified he slid down the steps and injured his lower back from doing so.

Claimant testified he immediately told his supervisor, Frank Provost, about his injury and was told to take some aspirin and sleep it off. That night, claimant took aspirin and attempted to sleep it off, but felt no better the next day. He told respondent he was still hurting and was told to toughen up. Claimant testified he ultimately quit his job because of personal reasons.

Claimant sought medical treatment from Dr. David L. Buller through his private health insurance carrier. Claimant saw Dr. Aly Gadalla at his attorney's request and told the doctor how the accident occurred. According to claimant, his back injury was not brought up, so he never told Dr. Gadalla about having back pain. Claimant testified his back is sore every day and he had right shoulder pain in 2012.

Dr. Buller's physician assistant saw claimant on December 4, 2014. Claimant reported injuring his right shoulder in a work accident on November 21, 2014. Other than the accident date discrepancy, claimant's description of how he injured himself was similar to his preliminary hearing testimony. Claimant was prescribed medication and referred for a right shoulder MRI.

¹ P.H. Trans. at 32-34.

Claimant's December 5, 2014, right shoulder MRI revealed a complex labral tear, increased signal intensity of the distal supraspinatus tendon that could be tendinosis or a small tear and mild impingement of the supraspinatus tendon caused by osteophytosis of the AC joint.

Dr. Gadalla evaluated claimant's right shoulder on March 17, 2015. The doctor reviewed claimant's MRI and Dr. Buller's records. His impression was right shoulder pain and a complex superior and anterior labral tear. The doctor recommended anti-inflammatory medications, physical therapy and an orthopedic evaluation. Dr. Gadalla opined the prevailing factor for claimant's right shoulder pain and rotator cuff tear was his work accident.

Claimant's May 13, 2015, deposition testimony

Claimant's cellular phone records for August 2014, which included calls claimant made to respondent, were introduced. Claimant testified he was in Las Vegas from August 12-17, 2014, and after seeing respondent's advertisement on Craigslist for workers, he called Kaylyn Price at respondent's Valley View, Texas, office. Claimant testified he was told by Ms. Price that respondent had job openings and needed to do a background check on him. Claimant testified:

Q. And so there was some meeting of the minds. Did you tell her you wanted to take the job?

A. It was never offered at that point in time. She told me they had to run the background checks and the PSPs and CSA² and all that. I mean --

. . .

Q. Okay. So there was -- and I don't mean this in a legal term, I'm trying to put it in descriptive fact words, but was there an agreement that you had reached with her to go forward in the process of getting that job.

A. I gave her the permission to run the background checks. That was about it.

Q. And what was going to happen after the background checks?

A. That was up to them. I didn't know at the time.³

² Claimant explained a PSP is a list of all his accidents, traffic tickets, etc., and a CSA consists of points the federal government issues to a driver for violations.

³ Claimant's Depo. at 16-18.

According to claimant, during the conversation with Ms. Price, the physical and drug test were not mentioned and he did not know how the job worked.

On August 18, claimant called Ms. Price from Anaheim, California, to check on the status of the background checks and was told they were not yet completed. Claimant called Ms. Price on August 19 and he was told the background checks were completed and “everything was good to go”⁴ and he needed to pass a physical and drug test at Via Christi in Wichita.

Claimant testified he had the physical and drug test in Wichita the next day, August 20. On August 21, claimant, while in Hutchinson, Kansas, spoke to Grant Moore, respondent’s territorial manager in Oklahoma, by telephone. Mr. Moore told claimant respondent received the drug test results and “welcome aboard.”⁵ Claimant took that to mean he was hired. According to claimant, Mr. Moore told him he would set up a time with Doyle in Alva, Oklahoma, for claimant to take a driving test and set up his housing.

Claimant went to Alva and took the driving test on Monday, August 25, which was the beginning of his orientation, and was given living quarters. Claimant testified he went back to Kansas that night and traveled to Enid, Oklahoma, on August 26 for orientation. According to claimant, he would not have gone to orientation on August 25 if he had not been offered and accepted a job on August 21. He indicated he was paid \$100 for orientation, including taking the driving test. After completing the driving test on August 25 and orientation on August 26, claimant went to Alva, where he stayed in housing owned by respondent. He commenced his regular job duties on August 27 and was paid hourly. Claimant testified:

Q. All right. And that was -- you had to complete that [driving test] as part of the process to become a driver for Alan Ritchey, Incorporated, correct?

MR. BRETZ: I’m going to object. It misstates the testimony.

Q. Okay. You can answer.

A. At that point when I accepted the job, I did not know this part of it.

Q. Okay. But it did happen.

A. It did happen.⁶

⁴ *Id.* at 9.

⁵ *Id.* at 10.

⁶ *Id.* at 44-45.

Claimant testified he previously sent and his wife faxed respondent a copy of his commercial driver's license (CDL) and also brought it to orientation. Claimant testified an essential part of his employment was having a CDL.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁸

K.S.A. 44-506, in part, states:

. . . the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides

Respondent asserts the last act necessary to complete claimant's contract for employment occurred in either Texas or Oklahoma. The basic principle is that a contract is "made" when and where the last act necessary for its formation is done.⁹ When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance.¹⁰

The preliminary hearing Order indicated the facts in *Deater*¹¹ are nearly identical to the facts in the present claim. In *Deater*, a Board Member found:

. . . the present record indicates that claimant contacted respondent in late 2004 about returning to its employ. Claimant was advised that a rehire vote was required and that he would be contacted. The record indicates someone from respondent later telephoned claimant at his Russell, Kansas, residence and advised him he could be rehired.

⁷ K.S.A. 2014 Supp. 44-501b(c).

⁸ K.S.A. 2014 Supp. 44-508(h).

⁹ See *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

¹⁰ *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973).

¹¹ *Deater v. Contract Freighters, Inc.*, No. 1,021,763, 2005 WL 3408003 (Kan. WCAB Nov. 10, 2005).

Respondent contends it did not offer claimant a job during that telephone conversation but merely invited claimant to Joplin, Missouri, to go through the company's orientation. Conversely, claimant contends respondent during that conversation extended him a job offer, which he accepted. Respondent scheduled claimant's orientation for November 22, 2004, and respondent also made arrangements for a bus pass. In addition, respondent advised claimant he would be paid \$25 per day while attending orientation, the company would pay for his motel accommodations, and the company would pay him 32 cents per mile when he began driving. But claimant did not go to the November 22, 2004, orientation due to personal reasons. Claimant's wife later telephoned respondent and a new orientation date was scheduled for December 6, 2004, which claimant attended.

The Board finds it is more probably true than not that the employment contract between claimant and respondent was formed in Kansas during the second telephone conversation when respondent advised the results of the rehire vote. It is reasonable to conclude that respondent extended an offer of employment to claimant at that time and that claimant accepted. Claimant's testimony regarding those facts is credible. Accordingly, claimant accepted the employment offer from his residence in Kansas. Consequently, the employment contract was formed in Kansas and there is jurisdiction under the Kansas Workers Compensation Act. [Footnote: See K.S.A. 44-506.]

In light of the above, the Board concludes the four-day orientation session, drug screening, driving test, integrity interview, and physical examination that claimant was required to undergo in Joplin, Missouri, were not condition precedents to forming the employment contract.

In *Shehane*,¹² Ms. Shehane lived in Kansas and auditioned for an acting job at a casino in Missouri. While at her Kansas home, Ms. Shehane verbally accepted a job during a telephone conversation with the Station's director of casting, who was in Kansas. Ms. Shehane was not told that drug testing was a prerequisite of the hiring process. She received a written contract at her home that referenced a pre-employment drug screening as a condition of employment. The contract stated that if she did not pass the drug screen, then the agreement was considered canceled and the offer of employment withdrawn. Station argued the last act necessary to complete the contract was the drug screening, which took place in Missouri.

The Kansas Court of Appeals held the creation of the contract was complete when Ms. Shehane accepted the offer of employment on the telephone and further when she signed the employment contract, both events occurring at her home in Kansas. The drug screening was a condition subsequent to the contract, not a condition precedent, and did not prevent the contract from initially coming into existence.

¹² *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

Respondent asserts the facts in this claim resemble those of *Speer*.¹³ Mr. Speer began working as a truck driver for Bob Wilbur in 1995. Mr. Wilbur was the owner and operator of a semi-truck which was leased to Sammons Trucking (Sammons). Sammons had no offices in Kansas and its main office was located in Missoula, Montana. Mr. Speer eventually became authorized to haul goods and materials for Sammons.

Mr. Wilbur died in 1997 or 1998. Mr. Speer contacted Sammons by telephone from his home in Wichita and asked if he still had a job and was told he did. However, Mr. Speer had several telephone conversations with Sammons personnel in which he indicated he was not going to work under the same terms. Eventually, an employment agreement was worked out. At the time of the telephone conversations, Sammons personnel were in Montana and Mr. Speer was in Wichita.

Mr. Speer was required to travel to Montana to pick up a company truck and to go through orientation. Mr. Speer traveled to Montana at Sammons' expense, where he completed orientation, signed paperwork, took a drug test and picked up his company truck. Mr. Speer admitted he would not have been hired had he failed the drug test. In 2002, Mr. Speer filed his workers compensation claim.

The Board ruled Mr. Speer's employment contract was not made within Kansas because the last act necessary for the contract's formation was the acceptance by Sammons' representative in Montana. Moreover, the Board found that Mr. Speer failed to prove that his principal place of employment was within Kansas and he was not subject to the Act under K.S.A. 44-506.

The Kansas Court of Appeals affirmed the Board, noting that Mr. Speer contacted Sammons in Montana and made an offer to work for Sammons, which Sammons accepted. The Court noted Sammons' acceptance was the last act necessary for the formation of the employment contract and occurred in Montana. The Court stated:

Even if we assume *arguendo* that Sammons made a counteroffer to Speer during the telephone conversation, Sammons asserts that "the last act necessary to consummate the employment agreement was for [Speer] to travel to Montana and successfully pass the drug test and orientation." After Speer's phone conversation with Sammons, he went to Montana where he signed papers, took a drug test, went through the rest of the orientation to be a company driver, and picked up his company truck. Speer's testimony indicated that he would not have been hired if he had failed the drug test in Montana. Speer further indicated that passing the drug test in Montana was a condition that he had to pass before he would be hired. Speer's own testimony indicates that he did not have a job with Sammons until he passed the drug test.

¹³ *Speer v. Sammons Trucking*, 35 Kan. App. 2d 132, 128 P.3d 984 (2006).

. . .

Different from the facts of *Shehane*, there is no written contract here indicating that the drug test, orientation, and other required paperwork were conditions subsequent to Speer's employment with Sammons. Moreover, it is apparent that Sammons would not have given Speer the keys to one of its trucks unless Speer had first satisfied these conditions. Speer admitted in his deposition testimony that passing the drug test was a condition that he had to meet before he would be hired. One might characterize Sammons' offer to Speer as follows: Sammons says to Speer, "Speer, if you will take and pass a drug test, complete orientation, fill out and sign required paperwork, Sammons will hire you." The taking and passing of the drug test and completing the other conditions must exist as a fact before there is any liability on Sammons to hire Speer. This was a condition precedent rather than a condition subsequent. Black's Law Dictionary 312 (8th ed. 2004) defines a condition precedent as "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises." Even if Sammons' representative Otis communicated a counteroffer to Speer during the telephone conversations, this counteroffer had conditions precedent that were not fulfilled until Speer completed the drug test, orientation, and paperwork while he was in Montana.¹⁴

Claimant provided inconsistent testimony. He testified at the preliminary hearing that he was offered a job by respondent during a telephone conversation when he was in Nevada, contingent upon him passing a driving test, drug test and physical and he was hired in Nevada. Claimant's recollection of the same telephone conversation during his deposition eight days later was considerably different. At the preliminary hearing, claimant testified he heard from a friend that respondent had a job opening and called a woman in respondent's human resources department, whose name he did not know. At his deposition, claimant indicated he saw an advertisement on Craigslist for job openings with respondent, recalled speaking to Ms. Price and averred he was never offered a job during the telephone conversation.

Claimant testified that after successfully completing a physical and drug test, he was at home in Kansas when respondent's representative in Texas called and offered him a job, which he accepted. He contends he was already working for respondent when he took the Oklahoma driving test. Claimant argues he entered into his employment contract in Kansas because he was in Kansas when he accepted respondent's job offer, the last act necessary to complete his employment contract. It also would mean his Oklahoma driving test was a condition subsequent to his employment contract.

Claimant applied for and was hired as a commercial truck driver. An essential part of his employment was having a CDL, which he brought to the orientation in Oklahoma. It is unfathomable respondent would hire a truck driver applicant without first requiring him

¹⁴ *Id.* at 143-45.

or her to pass a driving test. The very thing claimant was first asked to do in Oklahoma was pass a driving test. Also, claimant was not paid his regular hourly wages until after he completed the driving test and orientation. This Board Member finds the last act necessary to complete claimant's employment contract was successfully completing the driving test in Oklahoma. Successfully completing the driving test was a condition precedent to claimant's employment with respondent.

The issue of whether claimant met with personal injury by accident arising out of and in the course of his employment is moot.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁶

WHEREFORE, the undersigned Board Member reverses the July 24, 2015, preliminary hearing Order entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of September, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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¹⁵ K.S.A. 2014 Supp. 44-534a.

¹⁶ K.S.A. 2014 Supp. 44-555c(j).